United Nations S/2006/211

Security Council

Distr.: General
4 April 2006

Original: English

Letter dated 29 March 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

The Counter-Terrorism Committee has received the attached third report from Tonga submitted pursuant to paragraph 6 of resolution 1373 (2001) (see annex). I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Security Council.

(*Signed*) Ellen Margrethe **Løj**
Chairman
Security Council Committee established pursuant to
resolution 1373 (2001) concerning counter-terrorism

06-29796 (E) 050506

Annex

Letter dated 23 March 2006 from the Permanent Representative of Tonga to the United Nations addressed to the Chairman of the Counter-Terrorism Committee

I have the honour to attach herewith the third report of the Government of the Kingdom of Tonga pursuant to paragraph 6 of resolution 1373 (2001), on the steps taken to implement that resolution (see enclosure).

(*Signed*) Fekitamoeloa **'Utoikamanu**
Ambassador
Permanent Representative

Enclosure*

Third report of Tonga to the Counter-Terrorism Committee pursuant to paragraph 6 of resolution 1373 (2001)

1. Implementation measures

1.1 The CTC agrees on further questions and comments for the consideration of the government of the Kingdom of Tonga with regard to the implementation of the Resolution, as set out in this section.

1.2 The CTC is grateful to have received the provisions of the Criminal Offences (Amendment) Bill 2002 annexed to Tonga's supplementary report. Furthermore, the CTC notes that the Committee on Money Laundering and Financing of Terrorism Activities is working on new legislation to bring Tonga's legislative framework into line with international best practice, in particular those in relation to the International Convention for the Suppression of the Financing of Terrorism. In this regard, the CTC would be grateful to receive a progress report on the work of the Committee, including the indication of when the new legislation is likely to be ready for adoption.

Two pieces of legislation were approved during the 2005 session of the Legislative Assembly, namely, the Money Laundering and Proceeds of Crimes (Amendment) Bill 2005 (attached as ***Annex 1***); and the Transnational Crimes Bill 2005 (attached as ***Annex 2).***

Further amendments to the Money Laundering and Proceeds of Crimes Act are being considered for tabling to the Legislative Assembly in 2006 (Attached as ***Annex 3).***

1.3 The CTC notes Tonga's response at page 3 of the supplementary report to the CTC's inquiry about the available domestic legislation that specifically criminalizes the willful provision or collection of funds, financial assets of economic resources on its territory with the intention that they should be used in order to carry out terrorist acts. The CTC would, however, like to note again that the provisions of the Criminal Offences Act (Cap 18), referenced in Tonga's response and referred to as the Principal Act in the annexed Bill, address terrorist financing within the definition of "terrorist property" and not as a criminal act per se. The CTC therefore would appreciate receiving the supporting legislation referred to at page 3 of the supplementary report, which are cited as criminalizing the financing of terrorism. In addition, the CTC would appreciate receiving the results of the work of the Committee on Money Laundering and Financing of Terrorism Activities that were undertaken fully to implement sub-paragraphs 1(b) of the resolution, as suggested at page 3 of the supplementary report.

Part II of the Transnational Crimes Bill 2005 focuses on Terrorist Financing and Recruitment with the following new sections:

* Annexes are on file with the Secretariat and are available for consultation.

Section 6 implements the Convention for the Suppression of Financing of Terrorism

6. Terrorist Property "A person who, by any means provides or collects property, and having reasonable grounds to believe that the property will be used in connection with an act of terrorism, commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

Section 7 makes it an offence to provide services to a specified entity.

7. Provision of services to specified entity "Any person who makes available property, financial or other services for the benefit of a specified entity, other than for the purposes of humanitarian aid or legal services, commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

Section 8 makes it an offence to deal with terrorist property except where the Attorney General is advised of the dealing.

8. Dealing with terrorist property "

(1) Any person who-

(a) deals in any terrorist property;

(b) collects or acquires or possesses terrorist property;

(c) enters or facilitates any transaction in respect of terrorist property; or

(d) converts, conceals or disguises terrorist property

commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years."

(2) it is a defence to an offence under subsection (12) if that person as soon as he is aware that the property is terrorist property informs the Attorney General in writing and acts in accordance with any direction of the Attorney General for that property.

Section 9 makes it an offence to harbour terrorists

9. Harbouring of terrorists

Any person who harbours, conceals, prevents, hinders or interferes with the apprehension of any other person or having reason to believe that the other person -

(a) has committed or is planning or likely to commit an act of terrorism; or

(b) is a member of a specified entity

commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 15 years.

Section 10 makes it an offence to provide weapons to a specified entity.

10. Provision of weapons to a specified entity

Any person who offers to provide a weapon to or provides a weapon to-

(a) a specified entity; or

(b) a member of a specified entity; or

(c) any other person for use by or for the benefit of a specified entity or a member of a specified entity,

commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

Section 11 makes it an offence to recruit members for a specified entity.

11. Recruitment of terrorists

Any person who willfully recruits another person to -

(a) be a member of a specified entity; or

(b) participate in the commission of an act of terrorism

commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

Section 12 permits authorized officers to allow the controlled delivery of property for the purposes of gathering evidence or facilitating prosecution of persons for offences under the Bill.

12. Controlled delivery of property

An authorized officer may allow property that he reasonably suspects has been, is being or may be used to commit an offence under this Act, to enter, leave or move through the Kingdom for the purpose of gathering evidence to identify a person or to facilitate a prosecution for the offence.

1.4 The CTC would welcome receiving a progress report on the measures intended to regulate alternative financial remittance in Tonga, as indicated at page 12 of the supplementary report.

The National Reserve Bank of Tonga (NRBT) conducted a survey of money transfer businesses (MTBs) operating in Tonga in June 2005 to assess the type of financial services they provide and to assist in determining whether MTBs can be regulated under the Foreign Exchange Control Act under which it has legal administrative authority. It was found that most of these MTBs are very small businesses and are not dealing in foreign exchange; rather they were disbursing local currency (Tongan pa'anga) to their local clients; hence they may not be eligible to be licensed and

regulated under the Foreign Exchange Control Act. Legal opinion is being sought as to how these MTBs can be regulated for anti-money laundering and counter terrorism financing purposes.

1.5 With regard to sub paragraph 1(c) of the Resolution, the CTC would appreciate receiving any information about steps undertaken fully to implement this subparagraph, including any draft povisions.

Our previous report noted that there are two ways by which accounts and assets can be frozen, firstly through the provisions of Money Laundering Act 2000, and secondly through the Criminal Offences (Amendment) Act 2002, 78C.

Section 78C reads as follows:

(1) The Court may in addition to any penalty imposed under section 78A order the forfeiture of any -

(a) Cash, with any accrued interest or terrorist property;

(b) Article, substance, device or material by means of which the offence was committed; and

(c) Vehicle or vessel used in the commission of the offence.

(2) "Terrorist property" means property which -

(a) has been, is being, or is likely to used for an act of terrorism;

(b) is the proceeds of an act of terrorism; or

(c) is gathered for the pursuit of, or in conjunction with, an act of terrorism."

Section 2 of the Money Laundering Act defines "property" to mean cash and all other real or personal property of every description, whether situated in Tonga or elsewhere and whether tangible or intangible, and includes an interest in any such property.

Money laundering as defined under Section 17 of the MLA does not require a prior conviction for a predicate offense, and a person can be convicted of both the predicate offense and the money laundering offence.

Section 6 of the Transnational Crimes Bill 2005 defines terrorist property as an offence:

Section 6 implements the Convention for the Suppression of Financing of Terrorism

13. Terrorist Property: "A person who, by any means provides or collects property, and having reasonable grounds to believe that the property will be used in connection with an act of terrorism, commits an offence, and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

1.6 In relation to Tonga's response concerning subparagraph 1(d) of the Resolution, the CTC would welcome receiving an outline of the steps undertaken by the Committee on Money Laundering and Financing of Terrorist Activities, especially since Tonga's supplementary report, to extend the reporting obligation of suspicious transactions to professions and institutions engaged in financial transactions and cash deals, other than those financial institutions which are covered at present under the Money Laundering and Proceeds of Crime Act 2000.

The International Monetary Fund completed a report in February 2003 on "The Kingdom of Tonga - Pacific Project – Assessment of the Legal and Institutional AML/CFT Framework" which contains a general analysis of the Tongan legal and institutional framework to combat money laundering and the financing of terrorism, with issues to be addressed, along with recommendations in connection therewith. Specific recommendations have been approved for drafting of relevant provisions for the amendment of the Money Laundering and Proceeds of Crime Act 2000 to:

- include lawyers and accountants and money changers in the definition of financial institution in the MLA;

- specify what activities carried out by lawyers and accountants are actually covered by the Act and also specify, in relation to lawyers when acting as financial intermediaries, what part of their practice is subject to legal professional privilege;

The Money Laundering and Proceeds of Crime (Amendment) Bill 2005 amends the Money Laundering and Proceeds of Crime Act 1000 (CAP 28) by inserting new sections 22A, 22B and 22C which permit financial institutions to disclose information to the National Reserve Bank of Tonga relating to property owned or controlled by a terrorist group or property where there is reason to believe that it is owned or controlled by a terrorist group. Further disclosure is permitted to the Attorney General and transactions reporting authorities in Tonga and elsewhere. Persons who disclose information are protected from civil and criminal liability. The amendments also provides for some exemptions and penalties for contravening disclosure requirements.

1.7 In relation to wire transfers, referred to at page 12 of the supplementary report, the CTC would appreciate receiving a progress report in relation to the measures intended to enhance the capabilities of financial institutions to scrutinize and monitor suspicious activity fund transfers.

The Transactions Reporting Authority (TRA) has issued guidelines to licenced banks and foreign exchange dealers outlining their obligations under the Money Laundering and Proceeds of Crime Act 2000. By the end of October 2005, the TRA had issued formal and detailed AML Guidelines to the licensed banks and foreign exchange dealers covering a background on money laundering and legislative requirements, suspicious transactions,

customer due diligence and compliance regime. Training materials were also provided on how to scrutinize and monitor suspicious transactions.

The TRA also conducts onsite visits to licenced banks and foreign exchange dealers focusing on their compliance with the requirements of the Money Laundering and Proceeds of Crime Act 2000, internal controls, record keeping, training, and customer identification policies in relation to money laundering and terrorist financing.

The TRA intends to conduct an industry workshop in 2006 for all stakeholders to raise awareness of anti-money laundering and counter terrorism financing issues, and the importance of coordination of efforts to combat money laundering. The APG, International Monetary Fund and Australian Attorney General's Office will be assisting the TRA with this workshop.

The TRA disseminates terrorist lists from the UN and US Government to licenced financial institutions and foreign exchange dealers requiring them to report any transactions related to the list.

1.8 **The CTC notes that religious, cultural, educational and other non governmental institutions are required to be registered for tax purposes in Tonga and are required to file tax returns that include audited accounts. The CTC notes that Tonga considers this to form a basis for monitoring the resources of those institutions in order to ensure that they are not diverted for terrorist purposes. In this regard, the CTC would welcome receiving a further clarification regarding this process, including information about relevant supporting provisions which are intended to monitor both tax returns as well as accompanying audited accounts. In addition, the CTC would welcome any further clarification of how police surveillance is used to assist authorities in this regard.**

The Ministry of Finance (Revenue Services Division) scrutinizes all returns that are submitted by the religious, cultural, educational and other non governmental institutions. Any suspicious transaction can be further reviewed through existing mechanisms.

Police monitoring can be undertaken at two levels, firstly with activities of the groups; and secondly through its responsibility for investigating money laundering as well as other criminal activities in Tonga pursuant to its general police powers.

1.9 **With regard to the competence of the national courts of Tonga referred to at page 6 of the supplementary report, the CTC would be grateful to be provided with the relevant provisions in force which govern the national court's jurisdiction, including any extra territorial application thereof.**

The Courts of Tonga are governed by the (i) Constitution – CAP. 1 of the Laws of Tonga ; (ii) Court of Appeal – CAP . 9 of the Laws of Tonga; (iii) The Supreme Court – CAP. 10 of the Laws of Tonga; and the Magistrates Court – CAP. 11 of the Laws of Tonga. The full text of the

aforementioned legislation, and a diagram and description of the jurisdiction of each of the courts is detailed in ***Annex 4***.

1.10 The CTC notes that extradition may be used in cases where the jurisdiction of national courts may be limited, as suggested at page 6 of the supplementary report. In this regard, the CTC would be grateful to be provided with an outline of the relevant legal regime and provisions governing extradition. Also, please indicate to the Committee whether the laws of Tonga apply the principle aut dedere aut judicare in relation to offences referred to in sub-paragraph 2(c) of the Resolution.

A copy of the Extradition Act CAP22 of the Laws of Tonga is attached as ***Annex 5***

The Reciprocal Enforcement of Judgment Act (CAP 14 of the Laws of Tonga) provides for the enforcement of judgment of a foreign court against a Tongan resident.

1.11 Regarding the provisions of the Act on Mutual Assistance in Criminal Matters, outlined throughout pages 6, 7, 8, 9 of the supplementary report, the CTC would be grateful to be provided with an outline of the provisions applicable to requests submitted by a foreign State, similar to those provisions of section 6 of the Act concerning requests which the Attorney General of Tonga is authorized to make under section 4 of the same Act to a foreign state.

A copy of the Mutual Assistance in Criminal Matters Act 2000 is attached as ***Annex 6.*** The relevant sections pertaining to requests submitted by a foreign State are reproduced below:

(2) The Attorney General may, in respect of any request from a foreign State for mutual assistance in any investigation commenced or proceeding instituted in that State relating to a serious offence:

(a) grant the request, in whole or in part, on such terms and conditions as he thinks fit;

(b) refuse the request, in whole or in part, on the grounds that to grant the request would be likely to prejudice the sovereignty, security of Tonga or would otherwise be against the public interest; or

(c) after consulting with the appropriate authority of the foreign State, postpone the request, in whole or in part, on the ground that granting the request immediately would be likely to prejudice the conduct of an investigation or proceedings in Tonga.

Section 7 on the contents of requests for assistance reads as follows:

"(1) A request for mutual assistance shall:

(a) give the name of the authority conducting the investigation or proceeding to which the request relates;

(b) give the description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(c) give a description of the purpose of the request and of the nature of the assistance being sought;

(d) in the case of a request to restrain or confiscate assets believed on reasonable grounds to be located in the requested State, give details of the offence in question, particulars of any investigation or proceeding commenced in respect of the offence, and be accompanied by a copy of any relevant restraining or confiscation order;

(e) give details of any procedure that the requesting State wishes to be followed by the requested State in giving effect to the request, particularly in the case of a request to take evidence;

(f) include a statement setting out any wishes of the requesting State concerning any confidentiality relating to the request and the reasons for those wishes;

(g) give details for the period within which the requesting State wishes the request to be complied with;

(h) where applicable, give details of the property to be traced, restrained, seized or confiscated, and of the grounds for believing that the property is believed to be in the requested State;

(i) include an agreement on the question of the payment of the damages or costs of fulfilling the request; and

(j) give any other information that may assist in giving effect to the request.

(2) A request for mutual assistance from a foreign State may be considered but shall not be granted by the Attorney General until the request complies with subsection (1)."

Section 8 on foreign requests for an evidence gathering order or a search warrant reads as follows:

"(1) Notwithstanding anything contained in any other law for the time being in force, where the Attorney General grants a request by a foreign State to obtain evidence in Tonga, an authorised officer may apply to the Supreme Court for:

(a) a search warrant; or

(b) an evidence gathering order.

(2) The Supreme Court to which an application is made under subsection (1) shall issue an evidence gathering order or a search warrant under this subsection, where it is satisfied that there are reasonable grounds to believe that:

(a) a serious offence has been or may have been committed against the law of the foreign State; and

(b) evidence relating to that offence may :

(i) be found in any place in Tonga; or

(ii) be able to be given by a person believed to be in Tonga;

Provided that, in the case of an application for a search warrant, it would not in all the circumstances, be more appropriate to grant an evidence gathering order.

(3) For the purposes of the subsection (2) (a), a statement contained in the foreign request to the effect that a serious offence has been or may have been committed against the law of the foreign State is prima facie evidence of the fact without proof of the signature or official character of the person appearing to have signed the statement.

Several draft provisions are also being considered to amend the current Mutual Assistance Act 2000 and detailed as follows:

(1) There are currently no provisions for undertakings required from Foreign State. A ***draft*** has been proposed to amend the Mutual Assistance Act 2000 with the insertion of section 11A to deal with this issue and detailed as follows:

11A Undertakings required from a foreign State

The Attorney General shall, before authorizing assistance in accordance with section 4 of this Act, obtain undertakings from the foreign State in relation to the following matters:

(a) that the person to whom the request relates shall not -

(i) Be detained, prosecuted, or punished for any offence against the law of the foreign State that is alleged to have been committed, or that was committed, before the person's departure from the Kingdom of Tonga; or

(ii) Be subjected to any civil proceedings in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the persons departure from the Kingdom of Tonga, being civil proceedings to which that person could not be subjected if the person were not in the foreign State; or

(iii) Be required to give or provide evidence or assistance in respect of any criminal matter in a foreign State other than the matter to which the request relates,

Unless the person has left the foreign State, or has had the opportunity of leaving the foreign State, and has remained in that country otherwise than for the purpose of giving or providing evidence or assistance in respect of the matter to which the request relates;

(b) That any evidence given by the person in the criminal proceedings to which the request relates shall be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against a law of the foreign State other than the offence of perjury in relation to the giving of that evidence;

(c) That the person will be returned to the Kingdom of Tonga in accordance with arrangements agreed by the Attorney General as soon as practicable after giving the evidence;

(d) In a case where the request relates to a person who is a prisoner in the Kingdom of Tonga and the Attorney General requests the foreign State to make arrangements for the keeping of the person in custody while the person is in the foreign State-

(i) that appropriate arrangements will be made for that purpose; and

(ii) that the person will not be released from custody in the foreign State without the prior approval of the Attorney General; and

(iii) if the person is released in the foreign State, at the request of the Attorney General, before the completion of the proceedings to which the request relates, that the person's accommodation and expenses will be met by the foreign State;

(e) such other matters (if any) as the Attorney General thinks appropriate.

(2) 11B Requests by Attorney General on behalf of a defendant

(1) Where a defendant in a proceeding (original proceeding) relating to a criminal matter believes that it is necessary for the purposes of the proceeding that:

(a) evidence should be taken in a foreign State; or

(b) a document in a foreign State should be produced; or

(c) a thing or other article located in a foreign State should be produced and if necessary, seized; or

(d) arrangements should be made for a person who is in a foreign State to come to the Kingdom of Tonga to give evidence relevant to the proceeding,

the defendant may apply to the Supreme Court for a certificate that it would be in the interest of justice for the Attorney General to make an appropriate request to the foreign State under section 4, for:

(e) the evidence to be taken;

(f) the document to be produced;

(g) the thing or article to be seized; or

(h) the arrangement to be made.

(2) Before making a decision on the application, the Court must give an opportunity to:

(a) all parties to the original proceeding; and

(b) the Attorney General;

to appear before the (Court) and be heard on the merits of the application.

(3) In deciding whether to issue a certificate, (the Court) must have regard to the following matters:

(a) whether the foreign State is likely to grant such a request made by the Attorney General on behalf of the defendant;

(b) the extent to which the material (whether it is evidence, a document, an article or a thing) that the defendant seeks to obtain from the foreign country would not otherwise be available;

(c) whether the court hearing the original proceeding would be likely to admit the material into evidence in the proceeding;

(d) the likely probative value of the material, if it were admitted into evidence in the proceeding, with respect to any issue likely to be determined in the proceeding;

(e) whether the defendant would be unfairly prejudiced if the material were not available to the Court.

(4) Subsection (3) does not prevent the Court from having regard to any other matter that it considers relevant.

(5) If the Court issues a certificate-

(a) the Court must send a copy of the certificate to the Attorney General; and

(b) the Attorney-General must, in accordance with the certificate, make a request on behalf of the defendant to the foreign country for international assistance unless he or she is of the opinion, having regard to the special circumstances of the case, that the request should not be made.

(6) If a foreign country refuses a request made under subsection (5), the Attorney General must give a certificate in writing to that effect.

(7) A certificate under subsection (6) is prima facie evidence of the facts stated in it.

1.12 In relation to the need to strengthen the provision of Tonga's current immigration legislation, as indicated at page 10 of the supplementary report, the CTC would be grateful to be provided with those steps undertaken by Tonga that aim at introducing legislative requirements which will give full effect to subparagraph 2(g) of the Resolution.

The Passport (Amendment) Act was passed by the Legislative Assembly in 2003, a copy of which is attached as ***Annex 7.***

Under the Act, transportation companies, airlines and shipping companies are responsible for ensuring that passengers arriving in Tonga have valid travel documents. Previously the passenger had been responsible. A penalty of TOP$5,000 per passenger is fined for having invalid travel documentation.

Section 3(2) is repealed and substituted with the following

"3(2). Any international transportation company or person who provides passenger services to any person to travel into the Kingdom without a valid passport or valid travel document, or without valid written authority from the Ministry of Foreign Affairs shall pay the sum of $5,000 to the General Revenue."

The Minister of Foreign Affairs is given wider powers for canceling and re-calling Tongan passports.

Section 20 of the Principal Act is repealed and substituted by the following

"20(1). The Minister of Foreign Affairs may recall, cancel or recall and cancel any passport or certificate of identity issued under this Act for sufficient reasons which may include but shall not be limited to cases where

(a) the holder was issued with a passport or certificate of identity in the mistaken belief that the holder was, at the time of issue, entitled to a passport or certificate of identity;

(b) the passport or certificate of identity has been damaged or defaced as to render it, in the opinion of the Minister of Foreign Affairs, unsuitable for use;

(c) there is reasonable cause to believe that the particulars recorded therein are incorrect and, in the opinion of the Minister of Foreign Affairs, it would be inappropriate to change these particulars by endorsement;

(d) there is reason to believe that the passport or certificate of identity has been obtained by means of any false representation or any statement that is false in a material particular;

(e) there exists a valid passport and a certificate of identity in respect of the holder and there is no longer any sufficient reason in the opinion of the Minister of Foreign Affairs for this to be the case; or

(f) two or more valid passports or certificates of identity are in existence in respect of the holder and there is no longer any sufficient reason in the opinion of the Minister of Foreign Affairs for this to be the case.

(2) The Minister of Foreign Affairs may recall, cancel or recall and cancel any passport where the holder lawfully loses or is deprived of Tongan nationality.

(3) Where the Minister of Foreign Affairs has exercised his discretion to retain or cancel passport or certificate of identity under this Act or any regulations made hereunder, the Minister Affairs may on the application of the holder of the passport or certificate of identity, issue another passport or certificate of identity to replace that passport or certificate of identity."

An amended Section 21 of the Act specifically details possible passport offenses and transnational crimes such as people smuggling and trafficking.

Section 21 of the Principal Act is repealed and substituted with the following

'Offences 21(1) Any person who

(a) for the purpose of obtaining for himself or for any other person, any passport or certificate of identity, or other advantage under this Act with intent to deceive, makes or causes to be made any declaration, return or statement which he knows or has reasonable cause to believe to be false or misleading;

(b) otherwise than with the authority of the Minister of Foreign Affairs alters, or wilfully defaces, any passport or certificate of identity or endorsement in any passport or certificate of identity made under this Act, or any official or certified copy of such passport or certificate or identity;

(c) resists, hinders or obstructs the Minister of Foreign Affairs or any officer or other person in the lawful exercise of his powers under this Act;

(d) knowingly misleads or attempts to mislead the Minister of Foreign Affairs or any officer or other person in the lawful execution of his powers under this Act;

(e) unlawfully uses or without lawful authority has in his possession any:

(i) forged or unlawfully altered passport or certificate of identity, or other document issued or purported to have been issued under this Act;

(ii) forged or unlawfully altered birth certificate, marriage certificate or other document purporting to establish status or identity;

(iii) passport in which any visa, entry or endorsement has been forged or unlawfully altered; or

(iv) government instrument, including stamps, documents or materials designed for any purpose under this Act;

(f) knowingly uses or has in his possession any unlawfully issued or otherwise irregular passport, certificate of identity or other document issued or purported to have been issued under this Act;

(g) produces, surrenders or passes off any passport, certificate of identity, other document or anything purporting to be a passport, certificate of identity or other document

(i) as relating to that person when in fact, to the person's knowledge, it relates to some other person; or

(ii) knowing it to be forged or to have been obtained fraudulently;

(h) refuses or fails to comply with any notice issued to him under the provisions of this Act;

(i) refuses or fails to comply with any lawful term or condition subject to which any passport or certificate of identity has been issued to him under this Act;

(j) uses any passport or certificate of identity issued to or in respect of any other person as if it had been issued to or in respect of himself;

(k) knowingly or having reasonable cause gives, sells or parts with possession of any/passport or certificate of identity in order that it may be used in contravention of the provisions of paragraph (j) of this subsection;

(l) continues to possess more than one valid passport or certificate of identity when the Minister of Foreign Affairs has already notified such person that in his opinion there is no longer sufficient reason for this to be the case; or

(m) refuses to surrender or submit a passport or certificate of identity when recalled by the Minister of Foreign Affairs under section 20 of this Act,

shall be guilty of an offence against this Act.

(2) For the purposes of any proceedings for an offence under subsection (1)(a), a declaration, return or statement to which that subsection relates shall be deemed to have been made at the time and place at which the same was received by the officer or person to whom it was addressed.

(3) For the purposes of any proceedings for an offence under subsections (1)(b) and (e), the burden of proof of lawful use or lawful authority shall be upon the accused person.

(4) Where any person is convicted of any offence under subsection (1) the court may, in addition to any penalty imposed for such an offence, cancel his passport, certificate of identity or endorsement.

(5) In any proceedings for an offence under this section a person shall be deemed to know the contents of any declaration, return or statement which he has signed, marked or erased."

The maximum fines for an offence have been raised to $50,000 and the maximum term of up to 10 years imprisonment to prevent people from committing these offenses.

Section 22 of the Principal Act is repealed and replaced with the following

"22. Any person guilty of an offence against this Act for which no special penalty is provided shall be liable on conviction to a fine not exceeding $50,000 or to imprisonment for a term not exceeding 10 years or to both."

1.13 The CTC is pleased to note that Tonga is now party to the 12 international conventions on the suppression of terrorism. The CTC would be grateful to receive the relevant provisions under its domestic law corresponding to the measures introduced by the conventions to which Tonga has become a party.

Part III of the Transnational Crimes Bill 2005 deals with Counter-terrorism Conventions:

Section 13 defines "nuclear material"

13 Definition of "nuclear material"

For the purpose of this Part, "nuclear material" means any of the following -

(f) plutonium with an isotopic concentration of not more than 80% in plutonium-238;

(g) uranium-233;

(h) uranium containing uranium-233 or uranium-235 or both;

(i) uranium with a naturally occurring isotopic concentration, other than uranium in the form of ore or ore residue; or

(j) a substance containing nuclear material.

Section 14 implements article 4 of the Nuclear Material Convention. It makes it an offence to import into or export out of the Kingdom nuclear material or to transport nuclear material without written permission from the Prime Minister, with the consent of Cabinet.

14 Movement of nuclear material

(1) Any person who imports or exports nuclear material to or from the Kingdom except with written permission by the Prime Minister, with the consent of Cabinet, commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years;

(2) Any person who transports nuclear material within or over the Kingdom or through international waters or airspace without written permission from the Prime Minister commits an offence and upon conviction shall be liable to imprisonment for term not exceeding 25 years.

Section 15 allows for a licence to be granted for movement of nuclear material. It makes it an offence to make a false statement or to provide a false assurance under this section.

15 Licence for nuclear movement

(1) For the purposes of this section, "international nuclear transport" means the carriage of a consignment of nuclear material by any means of transportation intended to go beyond the territory of the country where the shipment originates-

(a) beginning with the departure from a facility of the shipper in the country; and

(b) ending with the arrival at a facility of the receiver within the country of ultimate destination.

(2) Written permission for the purposes of section 14(2) may be given only if the Prime Minister has received a written assurance from the person that the material will, during international nuclear transport, be protected at the levels in the Nuclear Material Convention.

(3) Any person who makes a false statement or provides a false assurance for the purposes of subsection (2) commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 15 years.

Section 16 implements article 7 of the Nuclear Material Convention. It creates offences relating to nuclear material.

16. Offences relating to nuclear material

Any person who -

(a) receives, possesses, uses, transfers, alters, disposes of or disperses nuclear material in a way that causes or is likely to cause death or serious injury to a person or substantial damage to property;

(b) steals nuclear material;

(c) embezzles or fraudulently obtains nuclear material;

(d) demands nuclear material by threat or use of force or any other form of intimidation; or

(e) threatens to -

(i) use nuclear material to cause death or serious injury to any person or substantial damage to any property; or

(ii) steal nuclear material to compel a person, State or an international organization made up of States or its agents to do or refrain from doing any act,

commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

Section 17 defines "ship" and imposes a duty on the master of the ship

17. Definition of "ship"

For the purposes of sections 18 and 19,-

(a) "ship" means a vessel that is not permanently attached to the sea bed including a hovercraft, hydrofoil, submarine or other floating craft, but not including a warship, a ship owned or operated by a state and being used as a naval auxiliary or for customs or police purposes or a ship that has been withdrawn from navigation; and

(b) A duty of a master of a ship to arrest, detain, deliver and notify the appropriate authority in Tonga shall include any other country that is party to the Rome Convention.

Section 18 implements both article 3 of the Rome Convention and article 2 of the Rome Protocol. It creates offences relating to maritime safety

18. Maritime safety offences

Any person who-

(a) seizes, or exercises control over a ship or fixed platform by force or threat of force or other form of intimidation;

(b) commits an act of violence, against a person on board a ship or fixed platform, that is likely to endanger the safe navigation of the ship or safety of the fixed platform;

(c) destroys a ship or fixed platform;

(d) causes damage, to a ship or its cargo or a fixed platform, that is likely to endanger the safe navigation of the ship or safety of the fixed platform;

(e) places, or causes to be placed, on a ship or fixed platform a device or substance, likely-

(i) to destroy the ship, or to cause damage to the ship or its cargo or likely to endanger the safe navigation of the ship; or

(ii) to destroy the fixed platform or to endanger its safety;

(f) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation in a way that is likely to endanger the safe navigation of a ship;

(g) communicates information, that he knows to be false, endangering the safe navigation of a ship; or

(h) injures or kills a person in the course of committing an offence under this section.

Section 19 implements article 8 of the Rome Convention. It provides for the arrest and delivery to the authorities of persons who have allegedly committed an offence against maritime safety. The master of a ship must notify the authorities and provide those authorities with any evidence of the offence in his possession. Failure to do so is an offence.

19. Arrest and delivery

(1) The master of a ship registered in Tonga who has reasonable grounds to believe that a person has committed an offence under section 18 shall:

(a) arrest and detain the person;

(b) deliver the person to the appropriate authority in Tonga; and

(c) give to the authorities evidence in his possession that the person has committed the offence.

(2) Where a person is delivered to a police officer under this section the police officer shall take the person into custody and deal with that person according to law.

(3) The master of a ship who contravenes subsection (1), commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 10 years.

Section 20 implements article I and IV of the Plastic Explosives Convention. It creates offences relating to the manufacture, possession, transportation and import and export of unmarked plastic explosives.

20. Plastic explosives offences

(a) Any person who manufactures unmarked plastic explosives commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years;

(b) Any person who possesses or transports unmarked plastic explosives commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

(c) Any person who imports or exports unmarked plastic explosives commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

Section 21 provides certain exceptions to the offences under section 20, which are mentioned in the Technical Annex to the Convention.

21. Exemptions

It is not an offence under section 20 if -

(a) the person has the approval in writing of the Prime Minister with the consent of Cabinet for use in

(i) research, forensic science purposes, development or testing of new or modified explosives; or

(ii) training in explosives detection or in the development or testing of explosives detection equipment.

(b) The unmarked plastic explosives are destined to be, and are incorporated as an integral part of duly authorized military devices including a shell, bomb, projectile, mine, missile, rocket, shaped charges, grenade or perforator, lawfully manufactured exclusively for military or police Convention.

1.14 The CTC notes that Tonga became a party to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction of 1992 on 29 May 2003 as indicated at page 11 of the supplementary report. The CTC would welcome receiving an outline of any measures introduced by Tonga in compliance with Article VII of the this Convention with a view to effectively implement the Terrorist Bombing Convention of 1992, to which Tonga is also a party.

Section 22 of the Transnational Crimes Bill 2005 implements article 2 of the Terrorist Bombing Convention

22 Terrorist bombing offence

22 (1) Subsection (2) applies to an action that is intended by a person to cause

(a) death or serious bodily injury; or

(b) extensive damage to a place, facility or system set out in subsection (2), if the damage results in or is likely to result in major economic loss.

(2) Any person who delivers, places, discharges or detonates an explosive or other lethal device in, into or against a -

(a) part of a building, land, street or waterway or other location that is accessible or open to members of the public, whether continuously, periodically or occasionally, including a commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place;

(b) facility, whether public or privately owned, that is used in or for a publicly available service for the transportation of persons or cargo; or

(c) publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, energy, fuel or communications commits an offence and upon conviction shall be liable to imprisonment for a term exceeding life.

1.15 The CTC would be grateful to receive an outline of the considerations which are involved in a decision to turn down a request for extradition. For example, under Tongan law, is it sufficient to refuse a request for extradition if an offence is deemed to be political in nature. What criteria are applied to determination that a particular offence constitutions "a political offence?" Are any of the offences mentioned in sub-paragraph 2 (c) of the Resolution, and/or under the international anti-terrorism instruments to which Tonga is a party deemed to constitute "political offences" under the domestic laws of Tonga? If not, the CTC would be grateful to receive copies of the relevant provisions of domestic legislation and regulations.

The relevant sections of the Extradition Act (CAP 22) of the Laws of Tonga defines the relevant offences whereby a person can be extradited, and what is not a "political offence", and therefore none of the offences mentioned in sub-paragraph 2(c) of the Resolution, and/or under the international anti-terrorism instruments to which Tonga is a party is deemed to constitute "political offences" under the domestic laws of Tonga. This provision has not been tested in the Courts yet.

Section 3 of the Extradition Act defines "Persons liable to be returned"

3. Subject to the provisions of this Act, a person found in Tonga who is accused of a relevant offence in any other country being a country designated in terms of section 4 of this Act or who is alleged to be unlawfully at large after having been convicted of such an offence in any country may be arrested and returned to that country as provided by this Act.

Section 5 of the Act defines the "Relevant Offences"

5(1) For the purposes of this Act, an offence of which a person is accused or has been convicted in a designated country is a relevant offence if;

(a) in the case of an offence against the law of a designated country, it is an offence which, however described in that law, falls within any of the descriptions set out in Schedule 1 to this Act, and is punishable under the law with imprisonment for a term of 12 months or any greater punishment;

(b) in any case, the act or omission constituting the offence against the equivalent act or omission, would constitute an offence against the law of Tonga if it took place within Tonga or, in the case of an extra-territorial offence, in corresponding circumstances outside Tonga.

(2) In determining for the purposes of this section whether an offence against the law of a designated country falls within a description set out in Schedule 1 of this Act, any special intent or state of mind or special circumstances of aggravation which may be necessary to constitute that offence under the law shall be disregarded.

(3) The descriptions set out in Schedule 1 of this Act include in each case offences of attempting or conspiring to commit, of assisting, counseling or procuring the commission of or being an accessory before or after the fact to the offences therein described, and of impeding the apprehension or prosecution of persons guilty of those offences.

(4) References in this section to the law of any country include references to the law of any part of that country.

Section 6 of the Act outlines General restrictions on return:

6(1) A person shall not be returned under this Act to a designated country or committed to or kept in custody for the purposes of such return, if it appears to the Prime Minister, to the court of committal or to the Supreme Court on an application for habeas corpus-

(a) that the offence of which that person is accused or was convicted is an offence of a political character;

(b) that the request for his return (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or

(c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

(2) A person accused of an offence shall not be returned under this Act to any country, or committed to or kept in custody for the purposes of such return if it appears as aforesaid that if charged with that offence in Tonga, he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.

(3) A person shall not be returned under this Act to any country, or committed to or kept in custody for the purposes of such return, unless provision is made by that law of that country, or by an arrangement made with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to Tonga, be dealt with in that country for or in respect of any offence committed before his return under this Act other than -

(a) the offence in respect of which his return under this Act is requested;

(b) any lesser offence proved by the facts proved before the court of committal; or

(c) any other offences being a relevant offence in respect of which the Prime Minister may consent to his being so dealt with.

(4) Any such arrangement as is mentioned in subsection (3) may be an arrangement made for the particular case or an arrangement of a more general nature; and for the purposes of that subsection a certificate issued by or under the authority of the Prime Minister confirming the existence of an arrangement with any country and stating its terms shall be conclusive evidence of the matters contained in the certificate.

(5) The reference in this section to an offence of a political character does not include -

(a) an offence against the life or person of the Head of the country or a member of his immediate family or any related offence;

(b) any offence against a Government Minister, or any related offence;

(c) murder or related offence;

(d) an act declared to constitute an offence under a multilateral international convention whose purpose is to prevent or repress a specific category of offences and which imposes on Tonga and the designated country concerned an obligation either to extradite or to prosecute the person sought; or

(e) any offence of genocide as defined by the Genocide Act, and any related offence including any direct or public incitement to commit such an offence, and it shall not be an objection to any proceedings taken against a person by virtue of the provisions of this Act that under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he was convicted he could not have been punished therefor.

(6) For the purpose of subsection (5), references to any related offence include in each case offences of attempting or conspiring to commit, of assisting, counseling or procuring the commission of or being accessory before or after the offences, and of impeding the apprehension or prosecution of persons guilty of those offences.

1.16 The CTC would welcome receiving a progress report regarding any developments in Tonga becoming a party to the United Nations Conventions Against Transnational Organized Crime and its three Protocols, as indicated at page 11 of the supplementary report.

Work is currently in progress with regard to Tonga becoming a party to the United Nations Conventions Against Transnational Organized Crime and its three Protocols; however provisions have been made in Section 23 to 32 of the Transnational Crimes Bill 2005 to implement the provisions of the Convention and its Protocols as follows:

Section 23 implements article 5(1)(a)(ii) of the Transnational Organised Crime Convention. It creates an offence of participating in an organized criminal group.

23 Organized criminal group

23 (1) For the purpose of this section, "organized criminal group". Means a group of at least three persons that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by penalty of at least four years imprisonment.

(2) Any person who participates as a member, associate member or prospective member in an organized criminal group and his participation contributes to the occurrence of criminal activity commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

Section 24: implements article 3(a) and 5(1) of the People Trafficking Protocol. It criminalizes people trafficking

24. Offence of trafficking in persons

Any person engaged in trafficking in persons commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

Section 25 implements articles 3(c) and 5(1) of the People Trafficking Protocol. It criminalizes trafficking in children.

25. Offence of trafficking in children

Any person engaged in trafficking a child commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 30 years.

Section 26 implements article 3 of the People Trafficking Protocol. It proves that consent is not a defence to an offence under section 24 and 25

26. Consent not a defence

It is not a defence for offences under sections 24 and 25 that the -

(c) trafficked person consented; or

(d) intended exploitation did not occur.

Section 27 implements articles 3(a) and 6(1)(a) of the People Smuggling Protocol. It creates the offence of people smuggling.

27 Offence of people smuggling

(1) Any person who intentionally, and in order to obtain, directly or indirectly, a financial or other material benefit, engages in people smuggling commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 15 years.

(2) Subsection (1) applies whether or not the person being smuggled enters or arrives in the receiving country.

Section 28 implements article 6(1(c) of the People Smuggling Protocol. It criminalizes facilitating an unauthorized person to stay in the country they have been smuggled into, where the act is done for a material benefit.

28 Offence of facilitation of unauthorized person

Any person who facilitates the continued presence of an unauthorized person in a receiving country in order to obtain a material benefit including financial or non financial payment commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 15 years.

Section 29: This section defines "craft"

29 Definition of "craft"

For the purpose of sections 30 and 31 a "craft" means an aircraft, ship, boat, or other machine or vessel used or capable of being used for the carriage of persons by water or over water.

Section 30: This section enables the Kingdom to stop, board and search a craft that the Kingdom of Tonga has reasonable grounds to believe is engaged in people smuggling. This section implements Article 5 of the People Smuggling Protocol which deals with the protection of unauthorized persons from criminal prosecution and the criminalization of conduct relating to people smuggling.

30 Boarding, searching and detention of craft

(1) An authorized officer may stop and board the craft within Tonga if the authorized officer has reasonable grounds to believe the craft is being used to commit an offence of people smuggling in Tonga.

(2) The authorized officer may, in connection with an offence of people smuggling -

(a) direct craft to stay where it is, or to be taken to a suitable place in Tonga, for the purpose of search;

(b) search and detain the craft, anyone on it and anything on it;

(c) question any person on board the craft;

(d) require the production of any documents relating to the craft or any travel or identity documents of a person on the craft;

(e) take a copy of any documents produced;

(f) seize and detain anything found on the craft that appears to him to be evidence of an offence against this Act; and

(g) remain on the craft for such period as is necessary for the purpose of boarding, searching and directing the craft or carrying out an investigation for an offence of people smuggling.

Section 31: This section relates to the right of hot pursuit

31 Right of Hot Pursuit

(1) An authorized officer may pursue a craft, which fails to stop at his request, into international waters and take an action that is necessary to stop the craft to enable it to be boarded other than in the territorial sea of another country.

(2) The authorized officer may require the person in charge of the craft, a member of the crew or any person on board to take any action that may be directed by an authorized officer.

(3) The person in charge of the craft shall give any authorized officer who remains on board the craft proper and sufficient food and suitable accommodation without charge.

(4) Any person who fails to comply with a direction of the authorized officer under this section shall be guilty of an offence and upon conviction shall be liable to a fine not exceeding $75,000 or imprisonment for a term not exceeding 15 years, or both.

Section 32: This section gives effect to article 6.3 of the People Smuggling Protocol. It imposes a higher penalty if there are circumstances that make the offence more serious.

32 Aggravated offences

A person who is in the course of committing any offence under this Act -

(a) subjects an unauthorized person to torture, exploitation or to any other cruel, inhumane or degrading treatment; or

(b) endangers the life or safety of the unauthorized person,

commits an aggravated offence under this Act and is liable upon conviction to imprisonment for life.

1.17 The CTC looks forward to receiving a full organizational chart of Tonga's administrative machinery, including police, immigration control, customs, taxation and financial supervision authorities which play a role in giving practical effect to the laws, regulations and other provisions that contribute to compliance with the Resolution.

The organizational chart of Tonga's administrative machinery, Money Laundering Committee, and Maritime Committee is attached as ***Annex 8.***

1.18 The CTC is aware that Tonga may have covered some or all of the points in the proceeding paragraphs in reports or questionnaires submitted to other organizations involving monitoring international standards. The CTC would appreciate receiving a copy of any such report or questionnaire as part of Tonga's response to these matters as well as details of any efforts to implement international best practice, codes and standards which are relevant to the implementation of the Resolution.

N/A